

UNITED STATES OF AMERICA)	PROSECUTION RESPONSE TO
)	DEFENSE OBJECTION
)	TO THE
v.)	STRUCTURE AND
)	COMPOSITION OF THE
DAVID M. HICKS)	MILITARY COMMISSION
)	
)	12 October 2004
)	

- c. MCO 1 specifies that each commission will consist of no less than three and no more than seven members. All members will be commissioned officers of the United States armed forces. The Appointing Authority (AA) shall personally select only those officers he determines to be “competent to perform the duties involved.”⁵ One of the

⁵ *Id.* ¶4.

members shall be designated as the Presiding Officer (PO) and must be a judge advocate of any U.S. armed force.⁶

d. The Accused was designated by the President for trial by military commission and charges against the Accused were referred to a Commission appointed in accordance with commission orders and instructions.

4. Analysis

a. The President has Lawful Discretion to Determine the Structure and Composition of Military Commissions.

The President has authorized the trial of certain individuals for violations of the law of war and other offenses triable by military commission. His authority for doing so is derived from 10 U.S.C. §821 and §836, and from his power as Commander in Chief, and explicit Congressional authorization to use all means necessary to defend the Nation.⁷ While Congress has clearly authorized the President to establish military commissions, it has chosen not to define the structure and composition of military commissions or the qualifications of commission members. On the contrary, Congress has given the President wide discretion to promulgate regulations governing these and other aspects of the commission process.

Unlike courts-martial, which are extensively regulated in the Uniform Code of Military Justice (UCMJ), nothing in the UCMJ specifies the structure and composition of military commissions or restricts the President in defining the structure of military commissions. In Article 36, Congress delegated to the President the power to prescribe rules of procedure and evidence for all types of military tribunals. It is the stated intent of Congress that such rules governing military commissions shall “apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts,” but only “so far as he considers practicable.”⁸ In section 1 of the PMO, the President expressly found that “it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of cases in the United States district courts.”⁹

The President’s broad authority to define the structure and procedures of military commissions was recognized by the United States Supreme Court in *Madsen v. Kinsella*,¹⁰ which affirmed the conviction and sentence of an American civilian by military commission in occupied Germany: “Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent

⁶ MCO 1, ¶4A(4).

⁷ The President asserts the legal basis of the PMO in the introductory paragraph: “By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows...”

⁸ 10 U.S.C. §836.

⁹ PMO §1(f).

¹⁰ 343 U.S. 341, 347-48 (1952)

governmental responsibilities related to war. They have been called our common law war courts. They have taken many forms and borne many names. *Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth.*"¹¹

The President is not required by law to conform military commissions to any particular military, civilian or international model. Existing models of judicial procedure, historical practice, and analogies to courts-martial may be useful sources of comparative analysis and practical guidance, but the structure and composition of the Commission in each case is determined by Commission Law¹² and the discretion of the Appointing Authority in selecting individual members.¹³ The Defense objection fails to offer any legal basis to challenge the President's authority to adopt the structure and composition of the Commission in this case. Rather, the Defense offers an unsupported complaint and a request for a tribunal that suits its own desires. An Accused has no right to select a tribunal of his own choosing.¹⁴

b. The Military Commission Is Based Upon Existing Legal Systems and Precedents.

Historically, military commissions and international military tribunals in which the United States has participated, follow the basic structure adopted under Commission Law. Such tribunals have traditionally consisted of three or more members serving as triers of both fact and law.¹⁵ This was the model used, for example, at the International Military Tribunals at Nuremburg,¹⁶ the American war crimes tribunals in Germany and the Philippines,¹⁷ and in the famous German saboteur cases, which were reviewed by the Supreme Court in *Ex Parte Quirin*.¹⁸ As the Defense itself points out, this is also the structure used in contemporary international war crimes tribunals, such as the International Criminal tribunal for the Former Yugoslavia.¹⁹ The Defense assertion that the Military Commission in his case is "not based on any recognized legitimate system of civilian, criminal, international, or military law" is simply false.

¹¹ *Madsen v. Kinsella*, 343 U.S. 341, 347-48 (1952).

¹² Part I (Preamble) of the Manual for Courts-Martial (2002), states: "*Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.*" ¶2(b)(2)(emphasis added).

¹³ MCO 1, ¶4A(1)(AA appoints commission members).

¹⁴ See *Colepaugh v. Looney*, 235 F.2d 429, 432-433 (10th Cir. 1956) ("an accused has no constitutional right to choose the offense or the tribunal in which he will be tried").

¹⁵ See Major Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar 2002, at 41 *et seq.*

¹⁶ See Major Jeffrey L. Spears, *Sitting in the Dock of the Day: Applying Lessons Learned from the Prosecution of War Criminals and Other Bad Actors in Post-Conflict Iraq and Beyond*, 176 MIL. L. REV. 96 (Jun 2003)(describing in detail the structure, composition and procedures of the IMT).

¹⁷ See *International Law, Vol. II*, DEP'T OF ARMY PAM. 27-161-2 (Oct 1962)(describing the structure and composition of American military commissions for the trial of war crimes after WWII).

¹⁸ 317 U.S. 1, 22-24 (1942). For further details on the structure, composition and procedures of the Quirin Commission see transcript of proceedings and related documents, *available at* http://www.soc.umn.edu/~samaha/nazi_saboteurs/indexnazi.htm

¹⁹ INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, RULES OF PROCEDURE AND EVIDENCE (as amended through Dec. 13, 2001) *available at* <http://www.un.org/icty/index.html>

The Commission appointed in this case also shares some characteristics of courts-martial under the UCMJ, which provides for a variety of court structures. Summary courts-martial consist of one commissioned officer, who is not required to possess legal qualifications; special courts-martial consist of at least three members, with or without a military judge; and general courts-martial are composed of a military judge and not less than five members.²⁰ In a special court-martial without a military judge, the president of the court is a voting member and also exercises “the same authority and responsibility as a military judge.”²¹ Like a military commission, this kind of special court-martial makes the presiding officer a voting member of the court. Under Article 25, UCMJ, “Any commissioned officer on active duty is eligible to serve on all courts-martial.”²² Each member of a court-martial must be individually selected by a convening authority based upon factors of “age, education, training, experience, length of service and judicial temperament.”²³

Military commissions are structured and selected in a manner very similar to courts-martial. All members of a military commission must be commissioned officers individually selected by the Appointing Authority based upon their competence to perform the duties of a member.²⁴ Each commission shall consist of at least three members and no more than seven members,²⁵ each possessing an equal vote on all issues of law and fact.²⁶ While the commission does not have a military judge *per se*, it does have a presiding officer with authority to control the proceedings and perform a variety of quasi-judicial functions necessary to ensure a full, fair, and expeditious trial.²⁷

Although it is beyond the scope of this memorandum, a survey of criminal courts throughout the civilized world reveals a rich variety of procedural, evidentiary and structural differences. For example, it is common in European nations within the Civil Law tradition to try criminal cases before courts composed of both professional and lay judges, each having an equal vote in deliberations.²⁸ Under international legal norms, a wide variety of procedural variations may be accommodated consistent with the goal of fundamental fairness. The field of comparative legal studies yields the central insight that it is possible to achieve fundamental fairness in different systems of law and through a variety of adjudicative processes.²⁹

c. Military Commission Rules and Procedures Incorporate Principles of U.S. Law and Provide for Full and Fair Trials.

²⁰ 10 U.S.C. §816.

²¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 502(b)(2) & R.C.M. 801 (2002).

²² 10 U.S.C. §825.

²³ *Id.*

²⁴ DoD Dir. 5105.70, ¶4.1.2

²⁵ MCO 1, ¶4A(2).

²⁶ *Id.*, ¶6F. *cf* MCI 8, ¶4A.

²⁷ MCI 8, ¶5.

²⁸ See HERBERT JACOB ET AL., COURTS, LAW & POLITICS IN COMPARATIVE PERSPECTIVE 207-09 (France) and 282-85 (Germany)(1996).

²⁹ See generally, *id.* at 1-14 (discussing value of comparative legal studies).

Although the Defense objection focuses on Commission structure and composition, the touchstone of Commission Law is fundamental fairness, not adherence to any particular form of court structure. A “full and fair trial,” not structural familiarity, is the proper measure of a military commission process.³⁰

Contrary to the Defense objection, Commission Law incorporates numerous salient principles of existing U.S. and international legal systems. We need not consider the many procedural variations that the President and Secretary of Defense *might* have chosen to employ. We need only assess whether that purpose is served under the rules given. The Defense fails to articulate how the structure of the Commission in this case undermines the goal of a fair trial.

Commission Law incorporates essential principles of fairness and due process. The Defense objection states that Commission Law is “devoid of any substantive or procedural guidance.” This is refuted by reference to the orders and instructions that govern the process. Commission Law mandates the following procedural safeguards which are derived from U.S. military and civilian law, as well as international law:³¹

- The presumption of innocence
- Burden on the Prosecution to prove guilt beyond a reasonable doubt
- The Accused’s ability:
 - To obtain witnesses and evidence
 - To cross-examine witnesses
 - To an attorney-client privilege
 - To testify or to remain silent at trial with no adverse inference drawn from silence
 - To be represented by detailed defense counsel at no cost to the Accused
 - To be represented by civilian counsel at no cost to the United States

These and other procedural protections are designed to ensure a full and fair trial for the Accused. Trials will be open to media and other observers to the extent possible consistent with national security.³²

d. The Military Commission is Capable of Performing Its Adjudicative Functions.

The Defense argues, in essence, that the Members appointed in this case will be unable to perform their adjudicative functions competently because they lack training and experience in the law of armed conflict and will be confused by simultaneous consideration of different cases. This argument exaggerates the difficulty of the task, underestimates the competence of the Members, and fails to state an objection based on law.

³⁰ PMO, §4(2).

³¹ See MCO 1, ¶5.

³² MCO 1, ¶6B(3).

The Defense asks that all members of the Commission be replaced by “legal professionals who possess extensive experience in international criminal law and/or the law of war, including the Geneva Convention and other applicable international treaties and provisions.” This request is based upon the naked assumption that only legal experts are capable of interpreting and applying the law. This is a false assumption, contradicted by the assumptions that undergird the law of armed conflict itself as well as historical and contemporary military and civilian legal systems that depend on the legal understanding and sound judgment of lay judges and jurors.

The Appointing Authority is required by Commission Law to appoint members and alternate members “based on competence to perform the duties involved.”³³ In making these selections, the Appointing Authority has access to the military records of the officers and a detailed knowledge of the duties that Commission members will have to perform. The Appointing Authority has chosen senior commissioned officers with extensive military experience and strong educational backgrounds.

The analytical demands of adjudication are no more complex than a broad range of professional tasks routinely performed by senior military officers. The production of a division or brigade operations order, for instance, requires thousands of contingent decisions based upon analysis of complex factors of mission, enemy, time, terrain and weather, and troops available. Such orders set in motion the movements of thousands of troops executing thousands of inter-dependent actions in support of multiple objectives.

Contrary to the unsupported assumptions of the Defense, the law of war is not beyond the ken of senior commissioned officers, regularly entrusted with such complex reasoning and decision-making. The law of war is intended primarily to ameliorate the harsh and inhuman effects of war.³⁴ It is intended to restrain commanders from the wanton and indiscriminate use of combat power on the battlefield. In other words, its principal field of application is not in courts of law but in the field of action where military force is in use. Officers trained and experienced in the application of law of war principles in the field are not only capable of applying the law of war in trials by military commission, but are possessed of insight and understanding in the application of the law in ways that may well exceed that of judge advocates.

Congress has entrusted numerous critical legal and judicial functions to military officers under the UCMJ. Most senior commissioned officers, like those appointed to serve on this Military Commission, have extensive experience in the practical application of military justice. Commanders and officers at all levels become familiar with the processes and rules of military justice through imposition of non-judicial punishment, service on summary, special or general courts-martial, service as investigating officers under Article 32, UCMJ, and by serving as convening authorities.

In view of the military justice responsibilities of officers, professional military education emphasizes the values and rules of military justice. Beginning with pre-commissioning courses and extending through officer basic and advance courses, senior

³³ MCO 1, ¶4A(3).

³⁴ FM 27-10, p. 3 (purposes of the law of war).

service colleges, and general officer pre-command courses, military officers receive extensive training in military justice, law of war and other relevant subjects. This training and experience in the legal aspects of military service have created a tradition of legal competence among commissioned officers. The Supreme Court has recognized the unique legal competence of military officers in matters of military justice in the case of *Weiss v. United States*.³⁵ Surveying the numerous legal functions and responsibilities of all commissioned officers under the UCMJ, the Court noted: “Although military judges obviously perform certain unique and important functions, all military officers, consistent with a long tradition, play a role in the operation of the military justice system.”³⁶

The considerations outlined here should be sufficient to dispel any doubts about the competence of senior military officers to sit as triers of fact and law in military commissions. The experience of history further attests to this conclusion. A survey of the use of military commissions throughout our nation’s history shows that line officers are capable of performing competently and fairly as members of military commissions.

e. Multiple Cases will Not Confuse the Members.

Commission Law allows for multiple cases to be referred to one military commission. The Defense contends that Commission Members who lack judicial experience “cannot be expected to compartmentalize four cases—which are proceeding simultaneously.” According to the Defense, members will be prone to confusion, unable to separate issues pertaining to the cases, and will fail to provide an “individualized determination of the issues” which is essential to fundamental fairness. These concerns over the ability of the Commission to provide individualized justice are misplaced.

The senior military officers appointed to this Commission routinely handle operational matters of great complexity, as their records and testimony in *voir dire* clearly demonstrated. The AA clearly believed that they were competent and capable to perform the intellectual tasks required. Moreover, the Defense exaggerates the challenge of compartmentalization. While multiple cases may be referred to one commission, all of the cases referred thus far involve one Accused. Both military and civilian courts allow for the joinder of multiple defendants in one trial.³⁷ Such joint trials often involve complex conspiracies and overlapping evidence of guilt. Yet the law expects and common experience shows that lay jurors are capable of reaching individualized determinations of guilt or innocence in such trials.

Finally, the normal practice of docketing will ordinarily separate the trial of each Commission case to avoid simultaneous proceedings. If some overlap does occur, the Prosecution is confident that the Members will be able to separate the issues.

f. Unique Legal Qualifications of the PO Will Not Jeopardize the Equal Vote of All Members.

³⁵ 510 U.S. 163, 174-75 (1994) (holding that the method of detailing and the lack of fixed terms for military judges does not violate the Due Process Clause of the 5th Amendment or the Appointments Clause of Art. II).

³⁶ *Id.*

³⁷ See, e.g., MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 812 (Joint and Common Trials).

The Defense asserts that the appointment of a PO with professional legal qualifications and experience will threaten the “equality among all members.” According to the Defense, the legally trained PO will naturally become a “greater among equals” and improperly influence the other members “contrary to the PMO.”

What the Defense argues here is that the disparity in legal qualifications between the PO and other members, which is anticipated but not required by MCO 1, is inconsistent with the PMO. According to the Defense, “The [PMO] makes equality among all members unmistakably clear, including the Presiding Officer.” This is incorrect. The PMO is silent on the composition of the commissions, qualifications of members and the voting rules for commissions. These aspects of Commission Law are delegated to the Secretary of Defense.³⁸ The source of the equal vote rule relied upon by the Defense is found in MCO 1,³⁹ which also specifies qualifications of the PO and other members.

The principle of equality among members means that each Member has an equal vote and voice in deliberations. Commission Law does not require equal personal qualifications among the Members of the Commission. The Defense cannot cite a single authority in military nor civilian law that requires complete equality in education and experience among judges or juries in any system of law. One of the foundational assumptions of military justice, accepted by Congress in the UCMJ and confirmed in practice, is that members of courts-martial will be able to do their duty and follow instructions to maintain their independence in deliberations and voting, despite vast differences in rank or other criteria.⁴⁰

The Defense underestimates the independence of the members and overestimates the value of legal credentials. While the PO is the only lawyer on this Commission, other members have equal military rank, comparable experience and advanced educational degrees. All members will have equal access to the legal briefs and evidence as they deliberate and vote on legal and factual issues presented to the Commission.⁴¹ All Members have equal opportunity to call and question witnesses and to query counsel on disputed issues of law and fact.⁴² All Members have an equal vote under Commission Law. The Prosecution has no doubts that all Members will perform their duties without undue influence from the PO.

³⁸ PMO, §6(a).

³⁹ MCO 1, ¶6F (setting forth voting procedures for the Commission). Commission Law requires that votes be taken by secret written ballot. The Court of Military Appeals has traced the history of the secret ballot procedure and found that “the rationale behind the secret written ballot rule is to prevent unlawful influence or use of superiority in rank to influence the vote of junior members.” *United States v. Greene*, 41 M.J. 57 (1994)(citations omitted).

⁴⁰ See *United States v. Greene*, 41 M.J. 57 (CMA 1994)(holding that failure of military judge to instruct members of court-martial regarding the use of secret written ballot was harmless error where the following instruction was given” “each of you has equal voice and vote....The senior member’s vote counts as one, the same as the junior member’s.”); see also *United States v. Accordino*, 20 M.J. 102 (CMA 1985)(holding that improper use of rank to influence a junior member’s vote constitutes unlawful command influence under M.R.E. 606(b)).

⁴¹ MCI 8, ¶4 (“...the full Commission shall adjudicate all issues of fact and law in a trial.”)

⁴² MCO 1, ¶6D(2)(c).

5. Legal Authority.

- a. President's Military Order of November 13, 2001.
- b. Manual for Courts-Martial (2002).
- c. Military Commission Order No. 1.
- d. Military Commission Instruction No. 8.
- e. DoD Dir. 5105.70.
- f. *Ex parte Quirin*, 317 U.S. 1 (1942).
- g. *Madsen v. Kinsella*, 343 U.S. 341 (1952).
- h. *Weiss v. United States*, 510 U.S. 163 (1994).
- i. *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956).
- j. *United States v. Greene*, 41 M.J. 57 (CMA 1994).
- k. *United States v. Accordino*, 20 M.J. 102 (CMA 1985).
- l. 10 U.S.C. §§816, 821, 825 and 836.

//Signed//

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